A **BRUNEI REPORT**

Zainuddin Dato Seri Paduka Hj Marsal v Pengiran Putera Negara Pengiran Haji Umar bin Pengiran Datu Penghulu Pg Hj Apong & Anor

B

COURT OF APPEAL (BRUNEI) — CIVIL APPEAL NO 5 OF 1996
FUAD P, HUGGINS AND CONS JJA
8 APRIL 1997

C ***Civil Procedure*** *— Costs — Discretion of court — Party who is time-barred cannot recover costs — Respondents' delay in raising plea of limitation — Whether appellant should reimburse the respondents for the costs*

D ***Limitation*** *— Repeal of statute — Expiration of cause of action — Defence of limitation raised — Earlier legislation repealed — Whether to apply old or new limitation period — Whether new provision should be construed to take away right accrued under the old provisions — Emergency (Limitation) Order 1991 [Brunei] — Limitation Act 1967 [Brunei]*

The appellant was arrested on 20 August 1986 under s 19 of the Emergency Orders 1962. While being detained at the police HQ, he alleged that he was ill-treated in a number of ways by the guards. As
E a result of this ill-treatment, the appellant required hospitalization. Two detention orders and subsequently a restricted movements order were issued against him. The appellant was finally free of restrictions on 11 April 1990. The appellant's complaints, on account of which he claims general, special, exemplary and aggravated damages, arise
F out of his arrest, detention and treatment between 20 August 1986 when he was first arrested, and 11 April 1990 when he was finally released from all restrictions. The appellant applied for leave to amend the statement of claim and to join six other defendants. The senior registrar dismissed this application and allowed the application of the original defendants to strike out the appellant's pleadings. This
G decision was upheld by the High Court commissioner. Before the senior registrar, the original and proposed additional defendants had relied upon the true effect and proper application of the Emergency (Limitation) Order 1991 ('the 1991 Limitation Order'). Only during the appeal before the commissioner did the defendants pray in aid
H rights which they said had accrued to them under the Limitation Act 1967 ('the 1967 Limitation Act') and which they maintained had not been affected by the repeal of that Act by the 1991 Limitation Order. The defendants contended that the repealed Act barred the action in its original and proposed formulation, but they submitted that if the Act could no longer avail them, then the 1991 Limitation Order
I provided them with impregnable limitation defences. There is also a cross-appeal by the defendants against the commissioner's order as to costs.

Held, dismissing the appeal and the cross-appeal:

(1) (Per **Fuad P**) Section 2 of the Limitation Order 1991 is not analogous to English provisions. Section 2(2) makes it clear that if an action had already been commenced when the order came into force, the limitation period to be applied and all other provisions would be those to be found in the repealed Act. Section 2 does not sweep away all accrued limitation defences. Further, s 2(1) of the Order deals with actions instituted after the date of its commencement (whether the cause of action had accrued before or after that date) but it does not address and therefore does not deal with causes of action which were already barred by limitation when the Order came into force. While s 2(1) of the Limitation Order 1991 applies even where the cause of action accrued before it came into operation, there is nothing in the language to compel a construction that has the effect of taking away a right to rely on a time bar which had accrued before the 1991 Order because of the lapse of a limitation period. As such, there was nothing to affect the respondents' accrued rights to rely on their limitation defence (see pp 14C–D, 16B–D and 17H).

(2) (Per **Cons JA**) As a general rule, a plaintiff who commences an action that he knows or ought to know is out of time cannot expect to recover any of his own costs should the defendant raise a successful plea in limitation. It is a risk that the plaintiff necessarily undertakes. But at the same time, all parties to litigation are expected to behave reasonably and with a view to costs, to conduct the litigation as economically as possible. If a defendant unnecessarily delays raising his plea, there is no reason why the plaintiff should reimburse him the costs incurred by his prolonging the litigation. Since an award of costs is discretionary and the commissioner had not in any way erred in principle, the cross-appeal was dismissed (see pp 18D–E, H–I and 19A).

[Bahasa Malaysia summary

Perayu telah ditangkap pada 20 Ogos 1986 di bawah s 19 Perintah Darurat 1962. Sementara ditahan di ibu pejabat polis, dia mengatakan bahawa dia telah dianiayai dalam pelbagai cara oleh pengawal-pengawal. Akibat penganiayaan ini, perayu memerlukan rawatan hospital. Dua perintah tahanan dan berikutnya satu perintah sekatan gerak-geri telah dikeluarkan terhadapnya. Perayu akhirnya dibebaskan daripada sekatan pada 11 April 1990. Aduan-aduan perayu, yang mana dia menuntut ganti rugi umum, ganti rugi khas, ganti rugi teladan dan ganti rugi teruk, timbul daripada tangkapan, tahanan dan rawatannya antara 20 Ogos 1986 apabila dia ditangkap buat kali pertama, dan 11 April 1990 apabila dia akhirnya dibebaskan daripada kesemua sekatan. Perayu memohon untuk kebenaran meminda pernyataan tuntutan dan untuk mencantumkan enam defendan yang lain. Pendaftar kanan menolak permohonan ini dan membenarkan

permohonan defendan-defendan yang asal untuk membatalkan pliding perayu. Keputusan ini disahkan oleh pesuruhjaya Mahkamah Tinggi. Di hadapan pendaftar kanan, defendan-defendan asal dan tambahan yang dicadangkan telah bergantung pada kesan sebenar dan pemakaian wajar Perintah (Had Masa) Darurat 1991 ('Perintah Had Masa 1991'). Hanya semasa rayuan di hadapan pesuruhjaya barulah defendan-defendan memohon hak-hak yang mereka mengatakan telah terakru kepada mereka di bawah Akta Had Masa 1967 ('Akta Had Masa 1967') dan yang mereka menegaskan tidak terjejas oleh pemansuhan Akta itu oleh Perintah Had Masa 1991. Defendan-defendan menghujahkan bahawa Akta yang dimansuhkan menghalang tindakan dalam bentuk asal dan yang dicadangkan, tetapi mereka menghujahkan bahawa sekiranya Akta tersebut tidak lagi membantu mereka, maka perintah Had Masa 1991 memperuntukkan mereka dengan pembelaan had masa yang kukuh. Terdapat juga satu rayuan balas oleh defendan-defendan terhadap perintah pesuruhjaya mengenai kos.

Diputuskan, menolak rayuan dan rayuan balas:

(1) (Oleh **Fuad P**) Seksyen 2 Perintah Had Masa 1991 tidak serupa dengan peruntukan Inggeris. Seksyen 2(2) menjadikannya amat jelas bahawa sekiranya suatu tindakan telah pun dimulakan ketika perintah itu berkuatkuasa, had masa untuk dipakai dan segala peruntukan lain adalah seperti yang dijumpai di dalam Akta yang dimansuhkan. Seksyen 2 tidak menghapuskan kesemua pembelaan had masa yang terakru. Seterusnya, s 2(1) Perintah itu adalah berkaitan dengan tindakan yang dimulakan selepas tarikh permulaannya (sama ada kausa tindakan terakru sebelum atau selepas tarikh itu) tetapi ia tidak mempertimbangkan dan dengan itu tidak berkaitan dengan kausa tindakan yang sudah pun terhalang oleh had masa apabila Perintah itu berkuatkuasa. Manakala s 2(1) Perintah Had Masa 1991 terpakai biarpun di mana kausa tindakan terakru sebelum ia mula beroperasi, tiada apa-apa dalam bahasa itu untuk mewajibkan tafsiran yang mempunyai kesan merampas hak untuk bergantung pada halangan masa yang terakru sebelum Perintah 1991 kerana tempoh had masa telah luput. Oleh itu, tiada apa-apa untuk menjejaskan hak terakru penentang-penentang untuk bergantung pada pembelaan had masa (lihat ms 14C–D, 16B–D dan 17H).

(2) (Oleh **Cons HR**) Sebagai rukun am, plaintif yang memulakan suatu tindakan yang disedari atau sepatutnya disedari adalah di luar masa tidak boleh menjangka mendapat balik apa-apa kos sendiri sekiranya defendan membangkitkan hujah had masa yang berjaya. Ia merupakan suatu risiko yang perlu ditanggung oleh plaintif. Akan tetapi pada masa yang sama, semua pihak kepada litigasi dijangka bertindak secara munasabah dan dengan mengambil kira kos, untuk menjalankan litigasi seberapa berjimat yang mungkin. Sekiranya defendan lewat dalam membangkitkan

rayuannya, tiada sebab mengapa plaintif harus membayar balik kos yang ditanggung kepadanya kerana melanjutkan litigasi. Oleh kerana satu award kos adalah berdasarkan budi bicara dan pesuruhjaya tidak terkhilaf dalam prinsip dalam apa cara jua, rayuan balas ditolak (lihat ms 18D–E, H–I dan 19A).]

Notes

For cases on discretion of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 881–887.

For a case on expiration of cause of action, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1916.

Cases referred to

Arnold v Central Electricity Generating Board [1987] 3 All ER 694 (refd)

Commonwealth of Australia, The v Verwayen (1990) 170 CLR 39 (refd)

Gardiner v Gardiner & Ors [1996] TLR 259 (refd)

Knight v Clifton [1971] 1 Ch 700 (refd)

Maxwell v Murphy (1957) 96 CLR 261 (refd)

McKain v RW Miller & Co (South Australia) (1991) 174 CLR (refd)

Ronex Properties Ltd v John Laing Construction Ltd [1983] 1 QB 398 (refd)

Sauria, The [1957] 1 Lloyd's Rep 396 (refd)

Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833; [1983] 1 MLJ 1 (refd)

Zainuddin Dato Seri Paduka Haji Marsal v Pengiran Putera Negara Pengiran Haji Umar & Anor [1997] 4 MLJ 135

Legislation referred to

Emergency Orders 1962 s 3 [Brunei]
Emergency (Limitation) Order 1991 s 2, 15 [Brunei]
Internal Security Act 1982 ss 3, 4 [Brunei]
Interpretation and General Clauses Act (Cap 4) s 10 [Brunei]
Limitation Act 1967 s 3, 11 [Brunei]
Limitation Act 1963 ss 1, 6, 15 [UK]
Limitation Act 1980 Schedule 2 para 9(1)(a) [UK]

Appeal from: Suit No 40 of 1994 (High Court, Brunei)

John Sackar QC and *Daud Ismail* for the appellant.
Robert Griffiths QC, *Rudi Kim Boon* and *John Lee* for the respondents.

Fuad P: This is an interlocutory appeal by the plaintiff, Zainuddin Dato Seri Paduka Haji Marsal, against the decision of Mr Commissioner Penlington dated 20 April 1996 whereby, after rehearing the matters before him as he was bound to do, he upheld the decision of Mdm senior

registrar Rokiah Swed given on 30 September 1995. The commissioner, in turn, refused the plaintiff leave to amend the statement of claim and to join six additional defendants, and allowed the application of the original defendants (D1 and D2) to strike out the plaintiff's pleadings under O 18 r 1 and the inherent jurisdiction. There is a cross-appeal by the defendants against the commissioner's order as to costs.

On 8 April, we dismissed the appeal and said we would hand down our reasons later. This we now do.

The plaintiff is a businessman. The respective positions of the defendants (D1 and D2) and of the proposed additional defendants (D3–D8), at the material time, were pleaded as follows:

D1 was the Commissioner of Police;

D2 was an Assistant Commissioner of Police;

D3 was the Minister of Home Affairs and special adviser to His Majesty the Sultan;

D4 was the Deputy Minister of Home Affairs;

D5 was the officer in charge of the 'prison' at the police HQ at Gadong;

D6 was the officer in charge of the detention centre at Jerudong;

D7 was the Assistant Commissioner of Police in charge of police operations;

D8 was one of the police officers in charge of the 'prison' at police HQ.

The plaintiff's complaints, on account of which he claims general, special, exemplary and aggravated damages, arise out of his arrest, detention and treatment between 20 August 1986 when he was first arrested, and 11 April 1990 when he was finally released from all restrictions.

I will now attempt to summarize the material facts the plaintiff pleads in his amended statement of claim upon which he bases his claims.

20 August 1986

(1) He was arrested (under s 19 of the Emergency Orders 1962) at the airport by D2 and other police officers, detained there for about one hour during which he was stripped and searched on D2's orders.

(2) He was then taken to police HQ on the orders of D1 and/or D2 without being told why he had been arrested and was being detained. There, after interrogation, he was locked up in a very small cell with poor ventilation.

(3) While detained at police HQ, he was ill-treated in a number of ways by the guards and further interrogated.

21 August 1986

(4) He was interrogated by D1 and D2 at police HQ.

25 August 1986

(5) As a result of this ill-treatment, his medical condition required hospitalization. He stayed in hospital for 14 days and for a further 10 days during the next month.

(6) While he was in hospital, and on each occasion on his way there and back, he was handcuffed so tightly that his wrists bled.

9 October 1986

(7) D8 told him that he would be imprisoned for 20–30 years. This made him suffer shock and contemplate suicide. He decided to escape and managed to do so (from a cell at police HQ). He suffered a number of injuries during his escape.

10 October 1986

(8) He was rearrested by D7 and other police officers and suffered further injuries.

(9) For five hours after his re-arrest, he received no medical treatment and was left lying on the cell floor. During this time, D7 kicked him on the chest.

(10) When he was sent to hospital, he stayed for about one month, and then returned to his cell. Thereafter, for about eight months, he was unable to walk and had to crawl.

12 December 1987

The first detention order was issued against him by D3 under s 3 of the Emergency Orders 1962. He was detained in Gadong until 28 December 1987.

28 December 1987

(11) Without being charged, and with no explanation, he was taken to Jerudong Detention Centre from Gadong by D5 and/or by officers under his direction where he was detained by D6 and by prison officers under him.

11 December 1988

The second detention order was issued against him by D3 under s 3 of the Internal Security Act.

11 April 1989

(12) He was released from detention when the detention order was suspended on terms contained in another order (a restricted movements order issued by D4 under s 4 of the Internal Security Act). The new order, inter alia, prohibited him from leaving his home between the hours of 10 pm and 6 am without approval and

A subject to certain conditions, from leaving the Muara district or Brunei without written approval and from taking part in any political activity.

(13) Throughout the period of his detention, he was never charged with any offence nor was he taken before any court. He was not told why B he had been arrested and, apart from what the orders said on their face, why he was being detained. He was not told that he had a right to object to his detention. He was not allowed to see any of his family or a lawyer.

11 April 1990

C

(14) The restricted movements order expired and he was no longer subject to any restrictions.

The plaintiff issued his writ, with the original statement of claim, on 7 May 1994. His application for leave to amend, and join additional D defendants was filed on 20 March 1995.

Before the senior registrar, D1 and D2, and the proposed additional defendants had relied, inter alia, upon the true effect and proper application of the Emergency (Limitation) Order 1991 ('the 1991 Limitation Order'). Only during the appeal before the commissioner did the defendants pray in aid rights which they said had accrued to them under the Limitation Act E 1967 ('the 1967 Limitation Act') and which they maintained had not been affected by the repeal of that Act.

It became, and remains the defendants' case that the repealed Act barred the action in its original and proposed formulation, but they submitted, *ex abundanti*, that if the Act could no longer avail them, then F the 1991 Limitation Order provided them with impregnable limitation defences.

The material parts of the repealed Limitation Act 1967 were in these terms:

G 3 Subject to sections 4 to 24 inclusive, every suit instituted after the period of limitation prescribed therefor by the schedule, if limitation has been set up as a defence, shall be dismissed.

SCHEDULE
(Section 3 and 6(1))

H

First Column	Second Column	Third Column	Fourth Column
	Description of Suit	Period of Limitation	Time from which period begins to run

I

8	For compensation false imprisonment.	One year	When the imprisonment ends.

19	For compensation any malfeasance, misfeasance or non-feasance, independent of contract and not herein specially provided for	Two years	When the malfeasance, misfeasance or nonfeasance takes place
92	For compensation for injury to the person.	Three years	When the injury is committed.

The Emergency (Limitation) Order 1991 came into force on 1 September 1991, and on that date repealed the 1967 Limitation Act. Section 2 of the 1991 Limitation Order contained transitional provisions in this form:

> (1) This Order shall apply to any action commenced after the date of coming into force of this Order, whether the cause of action accrued before or after that date.
>
> (2) Any action commenced before the date of coming into force of this Order, shall continue in accordance with, and be bound by, the provisions of the Act repealed by section 52 of this Order.

The material part of s 10 of the Interpretation and General Clauses Act Cap 4 (which applies 'save where the contrary intention appears ... ' s 2(1)) is as follows:

> The repeal of any written law shall not —
>
> ...
>
> (c) affect any right, power, obligation, restriction or liability acquired, accrued, imposed or incurred under any written law so repealed; ... .

As they did before the commissioner, the defendants relied heavily on the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833; [1983] 1 MLJ 1 on an appeal from Malaysia. There, the appellants were injured as a result of a traffic accident on 5 April 1972. Under a 1948 Ordinance, a limitation period of 12 months was imposed in the particular circumstances of the case, and the appellants' action became barred on 5 April 1973. The material part of the limitation provisions in s 2 of the 1948 Ordinance was in these terms:

> Where, after the coming into force of this Ordinance, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect — (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within 12 months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within 12 months next after the ceasing thereof; ... .

An Act of 1974, which came into force on 13 June 1974, amended the Ordinance and substituted a 36-month limitation period for the 12-month limitation period.

On 25 March 1975 (which was three weeks before the end of the 36 months which had elapsed since the accident), the appellants issued their writ claiming damages in negligence. The High Court of Malaya held that the 1974 Act had retrospective effect and so the action was not statute barred. On appeal, the Federal Court of Malaysia held that the Act was not to be so construed and that the plaintiffs' claim was barred by limitation. The Interpretation and General Clauses Ordinance in force in 1948 was replaced by an Act of 1967. Both statutes included provisions to precisely the same effect as s 10(c) of our Interpretation and General Clauses Act.

At p 836, Lord Brightman, who gave the opinion of the board, said:

> Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.
>
> Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.

Lord Brightman, at p 839, went on to say:

> Their Lordships consider that the proper approach to the construction of the 1974 Act is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. ...
>
> In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. Their Lordships see no compelling reason for concluding that the respondents acquired no 'right' when the period prescribed by the 1948 Ordinance expired, merely because the 1948 Ordinance and the 1974 Act are procedural in character. The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give and not to deprive; it was to give to a potential defendant, who was not on 13 June

> 1974 possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he has been retained, and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

Yew Bon Tew's case was considered and approved by the House of Lords in *Arnold v Central Electricity Generating Board* [1987] 3 All ER 694. In that case, Lord Bridge (with whose speech Lord Frazer of Tullybelton, Lord Brightman, Lord Ackner and Lord Oliver agreed) said this at p 703:

> Consistently with the presumption that a statute affecting substantive rights is not to be construed as having retrospective operation unless it clearly appears to have been so intended, it seems to me entirely proper, in a case where some retrospective operation was clearly intended, equally to presume that the retrospective operation of the statute extends no further than is necessary to give effect either to its clear language or to its manifest purpose. Construing ss 2A to 2D of the 1939 Act in the light of s 3 of the 1975 Act, I think that full effect is given both to the language and to the purposes of the legislation if it is held retrospectively applicable to all personal injury actions previously governed by the three year limitation period under the 1954 Act, whether as then enacted or as amended by the Act of 1963. Conversely, I can find nothing in the language or discernible purposes of the statute which leads clearly, let alone unavoidably, to the conclusion that defendants previously entitled to rely on the accrued six-year and one-year time-bars under the original 1939 Act which the 1963 Act left were intended to be deprived of those accrued rights by the 1975 Act.

On this aspect of the case, the commissioner referred to the observations of Donaldson LJ (as he then was) in *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398. In that case, Donaldson LJ said at p 405:

> Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.

The commissioner, after referring to the relevant legislation and to *Yew Bon Tew* and *Arnold*, said this at [1997] 4 MLJ 135 at p 157:

> Is there then a reasonable way in which s 2 of the [1991 Limitation Order] can be construed so as not to remove from the defendants their accrued rights of limitation under the [1967 Act]? In my view, there clearly is. It is by no means unreasonable to construe the purpose and effect of s 2(1) as providing that where an action is commenced after the coming into force of the [Order] if a period of limitation has not expired it shall be extended to

A the time limit provided by the [Order] but that does not mean to say that where a period has expired it shall be revived and so extended. The order does not say so specifically but I am satisfied that it must be so specific if the defendants are to be deprived of their accrued rights. Section 6 [sic] of the [1991 Limitation Order] provides the provision that one would expect in that it shall govern actions commenced after it comes into force even if the B cause of action arose before that date as would inevitably be the case for a period after that date. That is not, in my view, sufficient to construe the section as also saying that rights of action which were time-barred before the [1991 Order] came into force shall be revived if the Order extends the period of limitation.

Taking into account these authorities and s 10 of the Interpretation and C General Clauses Act (Cap 4), I consider that is beyond argument and that the plaintiff's claim for a false imprisonment against all defendants is clearly time-barred.

At the outset of the hearing of this appeal, we invited counsel to address us first on the question whether D1 and D2, as well as all the other D defendants the plaintiff sought to join, had a limitation defence under the repealed 1967 Limitation Act which was still available to them notwithstanding the promulgation of the 1991 Limitation Order. During discussion, Mr John Sackar QC, for the plaintiff, conceded that if the defendants had an inpregnable limitation defence in respect of the alleged false imprisonment cause of action, he could not argue that the same E defence was not available to them in relation to all the other causes of action pleaded and proposed to be pleaded. He accepted that all the causes of actions fell within items 8, 19 or 92 in the schedule to the 1967 Limitation Act. The position would be that claims which fell under the 'description of the suit' in item 8 should have been brought at the latest by F 11 April 1991; claims which fell under item 19, by 11 April 1992 and claims under item 92, by 11 April 1993. It will be recalled that the writ was issued on 7 May 1994.

Mr Sackar also conceded that his appeal could not succeed for these reasons alone if the court held that the commissioner was right on this issue.

G

After unanimously deciding that all the defendants possessed accrued rights to plead a time bar under the 1967 Limitation Act in respect of all the causes of action relied upon by the plaintiff, rights which were not affected by anything contained in the 1991 Limitation Order, we were of the opinion that it was not necessary for us to determine other issues raised H before the commissioner which featured in the notice of appeal and which would have no bearing on the defendants' successful plea.

The stand taken by the plaintiff on a plea of limitation which accrued under the repealed 1967 Limitation Act, is that the Interpretation Act provisions relied upon have no application since the contrary intention I appears from the 1991 Limitation Order properly construed because, where the repealing enactment contains transitional provisions which are intended to be exhaustive on their true construction, there is no room for the application of the general provisions in the Interpretation Act.

Mr Sackar has submitted that since sub-s (2) of s 2 of the 1991 Limitation Order identifies the actions to which the provisions of the repealed 1967 Act should continue to apply, there is no warrant for a further implication to the effect that the 1967 Act should also continue to apply to actions commenced after the 1991 Order came into force, but which were founded on causes of action which had accrued before that date and which were exhausted before that date. Moreover sub-s (1) of s 2 of the 1991 Order expressly provided that the 1991 Order shall apply to actions commenced after the Order came into force, even where the cause of action accrued before that date. Once again there was no justification for what would be a contrary implication to the effect that the 1991 Order shall not apply to actions commenced after the Order came into operation where the cause of action had accrued before that date but had been exhausted by virtue of limitation before that date.

It was therefore submitted that the commissioner's conclusions were contrary to the express and exhaustive language of s 2 of the 1991 Order when properly interpreted.

In support of his arguments, Mr Sackar pointed to the contrasting position under the transitional provisions contained in the Limitation Act 1980 of the UK.

Paragraph 9(1)(a) of Schedule 2 to the UK Act provides:

> Nothing in any provision in this Act shall —
>
> (a) enable any action to be brought which was barred by this Act ... before the relevant date [when certain provisions came into force].

Mr Sackar submitted that one would expect to find provisions on similar lines if the rights contended for by the defendants were well founded.

In further support of his submissions, Mr Sackar contended that *Arnold v Central Electricity Generating Board* [1987] 3 All ER 694 provides persuasive authority to guide this court in the task of interpretation. Mr Sackar took us through the statutes considered by Lord Bridge and drew our attention to his observations on the combined effect of ss 1, 6 and 15 of the UK Limitation Act 1963, at pp 698–699 of the report:

> It is, I think, beyond question that the 1963 Act operated retrospectively, when the appropriate conditions were satisfied, to deprive a defendant of an accrued time-bar in respect of a claim for damages for personal injuries in which the cause of action had accrued since 4 June 1954 and which had, therefore, been subject to the three-year period of limitation introduced by the 1954 Act.

I do not think it is necessary to set out what s 1 provided — but the material part of s 6 was in these terms:

> (1) Subject to the following provisions of this section, the provisions of this Part of this Act ... shall have effect in relation to causes of action which accrued before, as well as causes of action which accrue after, the passing of this Act, and shall have effect in relation to any cause of action which accrued before the passing of this Act notwithstanding that an action in respect thereof has been commenced and is pending at the passing of this Act ...

A (3) For the purposes of this section an action shall not be taken to be pending at any time after a final order or judgment has been made or given therein, notwithstanding that an appeal is pending or that the time for appealing has not expired; and accordingly section 1 of this Act shall not have effect in relation to a cause of action in respect of which a final order or judgment has been made or given before the B passing of this Act.

Of the relevant provisions of the 1963 Act, Lord Bridge said at p 699:

> Hence it is the new three-year period of limitation introduced by the amended s 2(1) of the 1939 Act which is no longer to be available as a defence if the court has granted the appropriate leave and the conditions as C to knowledge prescribed by s 1(3) are satisfied. The specific provisions relating to pending actions in s 6, distinguishing between actions awaiting trial and actions subject to appeal after final judgment, would be otiose unless the Act were intended, in any pending action awaiting trial, to deprive the defendant of a time-bar which had already accrued on expiry of the three-year limitation period at the date of issue of the writ. If that was D the intention in the case of pending actions, it must likewise have been the intention where the three-year time-bar had accrued but no action had yet been started.

Lord Bridge also discussed the transitional provisions of the Limitation Act 1975. Subsections (1) and (2) of that Act were to the same effect as E sub-ss (1) and (3) of the 1963 Act.

What Mr Sackar describes as critical is the observation made by Lord Bridge at p 703, that if the 1963 Act had not intervened between the 1975 Act and the earlier Act of 1954, then:

> I should have taken precisely the same view of its effect as that expressed by F Mr Ogden. In those circumstances, s 21 of the 1939 Act having already been repealed, there would, as I think, have been no effective counter to the argument that the generality of the language of the new s 2A of the 1939 Act, in the light of the retrospective effect given by s 3 of the 1975 Act, had swept away all time-bars in personal injury actions previously acquired since 1939, leaving all causes of action accruing since that date to be determined G by the application of the new statutory provisions.

Mr Sackar's case is that *Arnold* is compelling authority to the effect that the transitional provisions we have to construe, being closely analogous to the 1975 Act of the UK, had the effect of sweeping away all previously accrued time-bars.

H It is also submitted on behalf of the plaintiff that it was important to bear in mind that the 1991 Limitation Order introduced, for the first time in Brunei, specific and detailed provision postponing the time when the normal limitation period begins to run until, for example, the date of knowledge of the person injured. It was, it was contended, this that gave I the present case its closest analogy to *Arnold*. It was thus both plain and obvious that the 1991 Limitation Order, in the light of s 2, was intended to sweep away accrued limitation defences. Moreover, since the latent knowledge provisions in s 15 of the 1991 Limitation Order expressly applied to causes of action accruing before it came into force, this plainly demonstrated the legislative intent to sweep away all accrued rights.

In *Arnold*, Lord Bridge considered the effect of five Acts of Parliament (the last being a consolidating statute). He also made reference to two reports containing law reform proposals. Of course, Lord Bridge's analysis is most helpful but, in my judgment, we must be very cautious in applying one observation made in his examination of the legislative history he had to consider. However, I think that Mr Robert Griffiths QC (who did not appear before the commissioner) is right to point to significant differences in the statutes being reviewed by Lord Bridge and the provisions we have to apply. Mr Griffiths pointed to the passage I have cited in p 699 of Lord Bridge's speech as being the reason why the House of Lords came to the conclusion that the 1963 Act operated retrospectively in part.

It seems to me that it cannot properly be said that s 2 of our Limitation Order is analogous to the English provisions. As we have seen, s 2(2) makes it clear that if an action had already been commenced when the Order came into force, the limitation period to be applied and all other provisions would be those to be found in the repealed Act. Section 2 certainly does not sweep away all accrued limitation defences.

An alternative submission made by Mr Sackar was that the terms of the 1967 Limitation Act indicate that the limitation defence thereby provided is 'procedural' and not 'substantive'. It is contended that when that Act was repealed, the defendants were not in possession of accrued rights within the meaning of that expression in s 10(c) of the Interpretation and General Clauses Act. It is argued that *Yew Bon Tew* was not an authority that rejected the 'procedural'/'substantive' characterizations.

Mr Sackar submitted that a distinction is drawn in *Maxwell v Murphy* (1957) 96 CLR 261 and in *Yew Bon Tew* between a limitation provision which bars the institution of proceedings and one which may be pleaded after proceedings have commenced. In *Yew Bon Tew*, it is said the Privy Council had to consider a limitation provision which barred a cause of action which was not the case here.

It will be recalled that s 3 of the 1967 Limitation Act provides that 'every suit instituted after the [prescribed] period of limitation ... if limitation has been set up as a defence, shall be dismissed'. In my judgment, the right given to a potential defendant under provisions of that kind is no different in substance from the right given to a defendant under legislative provisions of the following kind: 'An action founded on ... shall not be brought after the expiration of ... from the date on which the action accrued'.

It is to be noted that even when provisions in the latter form apply, a limitation defence has to be raised and the question cannot be determined until the issue comes to court. It seems to me quite clear that under s 3 of the 1967 Limitation Act, the right given to a defendant is to have the action against him dismissed if the limitation period has passed and limitation is relied upon. The result is the same. I think that Mr Sackar points to a distinction without a difference.

I mention here that Mr Sackar cited the Australian case of *McKain v RW Miller & Co (South Australia)* (1991) 174 CLR 1 as being helpful. This was a private international law case where the High Court of Australia

A held, inter alia, that a true statute of limitation which does no more than cut off resort to the courts for the enforcement of the claim is a procedural law, while a statute which extinguishes a civil remedy and destroys a cause of action is a substantive law. Of course, such considerations are relevant in the conflict of laws context to decide if the limitation rules do or do not form part of the lex fori.

B

While we must not treat Lord Brightman's dicta in *Yew Bon Tew* as if they were words in a statute, it seems to me, despite his attempts to persuade us otherwise, that Mr Sackar's submission flies in the face of the important principle so clearly stated by the Privy Council, and approved by the House of Lords in *Arnold*. Put briefly, our task is to consider the C whole of the legislative provisions we have to interpret in their proper context to ascertain the intention of the legislature as expressed by the wording employed. In doing so, we have to give effect to the common law prima facie rule (here reflected in the Interpretation and General Clauses Act) that existing rights are not impaired unless such a construction is D unavoidable. The court will also apply the presumption explained by Lord Bridge in *Arnold* that where some retrospective operation is intended, the statute is not to be construed so as to give it a wider retrospective operation than the language used makes necessary. This is the approach, in line with the authorities, adopted by the commissioner.

E Of course, if only one meaning can be given to the provisions under review, the court must disregard any apparent anomaly or seeming absurdity and construe the words used in their ordinary sense. But where this is not so, the court will seek to interpret the provisions in a way that does not result in absurdity. I accept Mr Griffiths submission that it is legitimate to have regard to the result of accepting Mr Sackar's construction.

F Let us consider a case where two men, who claim that they have been falsely imprisoned by the same authority are released on the same day — 20 August 1990. Under the 1967 Limitation Act, the period of limitation (item 8 of the schedule) was one year from when the imprisonment ended, excluding the day on which the right to sue arose (s 11). Therefore, under G the 1967 Act, if they did not institute their action by 21 August 1991, their action would be dismissed. It will be recalled that the Order came into force on 1 September 1991. Suppose one of the men brings his action on 23 August 1991. If limitation is relied upon, under s 3 of the 1967 Limitation Act, read with s 2(2) of the 1991 Limitation Order, his action will be dismissed. If the other man sits back and does nothing until he files H his action on 15 August 1996, if Mr Sackar is right, no limitation defence will be available against him because the limitation period for false imprisonment under the 1991 Order is six years. I think we are entitled to ask ourselves if the legislature could have intended such a strange result.

I agree with Mr Griffiths that the attempt made on behalf of the I plaintiff to persuade us that the transitional provisions are 'exhaustive' and that therefore there is no room for the application of the common law rule of construction (and the Interpretation Act provisions) applied by Lord Brightman, cannot be sustained. That approach simply begs the question.

Once it is accepted, as it must be, that an accrued right to plead a time bar is 'in every sense a right ... which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable', recalling Lord Brightman's opinion in *Yew Bon Tew*, the question to address is whether the right given by s 3 of the 1967 Limitation Act was taken away by s 2 of the 1991 Order.

Section 2(1) of the Order certainly deals with actions instituted after the date of its commencement (whether the cause of action had accrued before or after that date) but it does not address and therefore does not deal with causes of action which were already barred by limitation when the Order came into force. Here we have authorative guidance from Lord Bridge's speech in *Arnold*. Adopting his approach, while s 2(1) of the 1991 Limitation Order is retrospective in the sense that it makes it perfectly clear that it applies even where the cause of action accrued before it came into operation, there is nothing in the language to compel a construction that has the effect of taking away a right to rely on a time bar which had accrued before the 1991 Order because of the lapse of a limitation period. It is right that we bear in mind what Lord Brightman said in *Yew Bon Tew* at pp 839j–840a about the whole purpose of the limitation defence. When the previously applicable limitation period has not expired and is extended, the position is quite different.

In my view, the absence of a provision on the lines of para 9 of schedule to the UK Act of 1980: 'Nothing in ... this Act shall enable any action to be brought which was barred by this Act' does not lessen the force of the presumptions applied in *Yew Bon Tew* and *Arnold*.

We were also asked to hold that it would be unconscionable to allow the defendants to rely on the expiry of a limitation period in circumstances where it is the wrongful act itself which effectively precluded the institution of proceedings within the limitation period.

The following particulars were given of the unconscionability relied upon (these were particulars of para 7A of the plaintiff's amended reply):

1 The plaintiff was wrongfully detained between 20 August 1986 and 11 April 1990.

2 The first to eighth defendants are liable for the plaintiff's wrongful decision as alleged in the plaintiff's amended statement of claim.

3 Each of the first to eighth defendants by reason of the matters alleged in the amended statement of claim, bore a relationship to one another such that it would be unconscionable to allow one defendant to rely upon the conduct of another to defeat the plaintiff's claim by reliance on a limitation statute.

4 In the course of the plaintiff's detention the eighth defendant threatened the plaintiff that he would be imprisoned for 20 to 30 years.

5 Upon the plaintiff's release from the Jerudong Detention Centre on 11 April 1989, the fifth and sixth defendants, in company with several other officers, threatened the plaintiff that if he discussed the circumstances of his detention with anyone, the detention order would be reinstated and that the plaintiff would be rearrested and further detained.

6 The first to eighth defendants wrongfully imprisoned the plaintiff and each has participated in creating an apprehension in [him] that the exercise of his legal rights would result in his rearrest and further imprisonment.

7 The plaintiff delayed commencing legal proceedings as a direct result of the conduct of the defendants described above.

8 In these circumstances, the first to eighth defendants are estopped from relying upon a limitation defence, they having induced the plaintiff to act to his detriment in failing to commence legal proceedings.

Mr Sackar was not able to cite any authority to us where the doctrine he urges upon us has been applied. The defendants' helpful skeleton arguments draw our attention to what Andrew McGee has to say in his *Limitation Periods* (2nd Ed, 1994) on 'Foregoing the statute', 'The effect of prior admissions' and 'Contracting out of the statute' at pp 350–352. About the authorities McGee discusses, at p 352 he says, after mentioning the decision of the English Court of Appeal in *The Sauria* [1957] 1 Lloyd's Rep 396:

> The Court of Appeal appeared to treat all four cases as belonging to the same line of authority. This makes it somewhat difficult to know whether admissions and contracting out are different ways of avoiding the effect of the statute or merely different ways of saying the same thing. It is submitted that they are conceptually different, but likely to overlap considerably in practice. There may, for example, be an agreement not to plead the statute even though there is nothing in the nature of an admission of liability. For such agreement to be legally effective, it is submitted that it must genuinely amount to a contract; ie the plaintiff must give some consideration for the promise. Most commonly this consideration will be in the form of an agreement to delay the commencement of proceedings. Where there is an admission of liability, by contrast, it appears that there is no necessity to find a true contract, and the statute will be held inapplicable on more general equitable grounds, though of course in cases of this type it will commonly happen that the plaintiff has relied upon the admission of liability as a reason for not instituting legal proceedings.

The defendants correctly point out that the cases referred to by McGee have the same feature in common — they led the plaintiff to believe that the defendant would not rely on his statutory limitation rights. The same feature appears to have been present in *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 39, a decision of the High Court of Australia.

On the material before us I do not find it possible to recognize that the plea put forward, on the grounds particularized, could affect the accrued rights of the defendants to rely on their limitation defence.

I agree with the judgment of Cons JA which follows on the cross-appeal and with the orders he proposes.

Huggins JA: I agree with the reasons given by my Lord, the President, and agree also with the order as to costs which Cons JA has indicated to me that he intends to propose.

Cons JA: I agreed with the order we made on the 8th of this month for the reasons which my Lord, the President, has just explained. A

I turn now to the questions which have regard to costs.

At the conclusion of his reserved judgment, the commissioner made an order nisi, modifying it later after receiving full argument, to an order that the plaintiff should have half his costs before the senior registrar against the first, second and the fifth to seventh defendants and that there should be no order as to costs in the proceedings before himself. It is apparent from his written ruling that he was influenced as to the former by the fact that the plaintiff should have succeeded overall before the senior registrar, but would have failed in many of his contentions; and as to the latter, by the fact that it was only at the very end of the proceedings that the defendants raised their plea under the 1967 Act. It is submitted now that the commissioner ought instead to have ordered that the defendants receive all their costs both before him and before the senior registrar. B C

It seems to me that as a general rule, a plaintiff who commences an action that he knows or ought to know is out of time cannot expect to recover any of his own costs should the defendant raise a successful plea in limitation. It is a risk that the plaintiff necessarily undertakes. But at the same time, all parties to litigation are expected to behave reasonably and with a view to costs, to conduct the litigation as economically as possible: cf para 1 of the Practice Direction (Civil litigation: case management) [1995] 1 WLR 508. If then a defendant unnecessarily delays raising his plea, I see no reason why the plaintiff should reimburse him the costs incurred by his prolonging the litigation. And there may even be exceptional instances where justice demands that he pay some or all of the plaintiff's costs: *Knight v Clifton* [1971] 1 Ch 700. D E

We were referred to *Gardiner v Gardiner & Ors* [1996] TLR 259 as authority that where a plaintiff's claim is actually struck out, it is inevitable that he bear all the defendant's costs, regardless of how the litigation has proceeded. I respectfully draw no assistance from that case, which appears not to have been a limitation case but one in which 'the plaintiff had been wrong to commence the proceedings'. By the very nature of a plea in limitation, that can hardly be said of a case in which the plea is eventually raised. F G

An award of costs being discretionary, the defendants attack the commissioner's order in principle by suggesting that he failed to realize that the '1967 issue' was not a new point, but merely a variation of an old one, the plaintiff having been faced with a time bar defence throughout. H

I am unable to agree with that suggestion. Although of course similar in nature, the plea under the 1967 Act is in my view a completely separate and distinct matter from the plea under the 1991 Order.

In an appeal of this kind, this court has to put itself in the position of the judge below, he having come to the same decision as this court, which in the present instance, of course, he did, without having regard to the subsequent conduct of the parties or to what might perhaps be inferred therefrom. In that circumstance, I have on consideration come to the I

A conclusion that the order he made was not one that I might myself have made, but is not such that I would have to assume that in some undisclosed way he erred in principle. I would therefore dismiss the cross-appeal in this respect.

As to the costs of the appeal itself Mr Sackar, for the plaintiff, has
B urged that the normal order following the event should in some way be modified to reflect the fact that a large number of the facts raised by the plaintiff remain undecided, the event therefore still being in doubt. I do not think that would be right. So far as this court is concerned, the appeal has been dismissed and the usual order should follow. If, at same future date, it should be found that any one of those remaining points is in fact
C in the plaintiff's favour, then the whole question of costs will naturally be reopened, and Mr Sackar's concerns can be met appropriately.

For these reasons, I would order that the defendants should have their costs in the appeal and that the order of the court below remain undisturbed. We have heard no argument as to the costs of the cross-
D appeal, which also includes matters we have not dealt with, and I would therefore make an order nisi that the plaintiff should have the costs thereof, the order to become absolute if no application be made to vary within two months of the date hereof.

E *Appeal and cross-appeal dismissed.*

Reported by David Lai

F

G

H

I